

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Petition of Diagnostic Imaging Holdings, Inc.
For Waiver of Section 64.1200(a)(4)(iv) of the
Commission's Rules

CG Docket No. 05-338

**PETITION OF DIAGNOSTIC IMAGING HOLDINGS, INC.
FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,¹ Diagnostic Imaging Holdings, Inc., on behalf of all of its subsidiaries, affiliates and related entities (collectively "Diagnostic") respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Diagnostic (or on its behalf) with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. For the reasons stated, a waiver is appropriate here.

I. INTRODUCTION.

Diagnostic is in the business of managing and delivering high-quality medical imaging and related services to medical patients. Diagnostic, by and through its subsidiaries and related entities, conducts its business by coordinating with healthcare providers who refer patients to Diagnostic facilities to be imaged and receive related services. Because Diagnostic's business is almost entirely referral-based, Diagnostic has an extensive network of account executives who engage in in-person, door-to-door marketing efforts with referring physicians and other sources of potential imaging patients. Diagnostic's network of referring physicians refer patients by

¹ 47 C.F.R. § 1.3.

telephoning or faxing information, and requesting that certain services be performed by Diagnostic for the referring physician to aid in patient diagnosis and treatment. Diagnostic performs the requested services, manages the insurance billing, and typically sends the results of the services back to the referring physician via facsimile. The account executives and center staff typically confirm that the referring physicians agree to receive future communications regarding Diagnostic via in-person visits, mail and/or facsimile. Diagnostic has also started confirming the express consent (and re-confirming) in connection with every referral. Diagnostic sends facsimiles to referring physicians, who have provided their prior express consent to receive such facsimiles, in an effort to advise referring physicians of the services they offer, new products, or other new developments at Diagnostic locations.

Many companies in the same industry as Diagnostic, as the Commission knows, face putative class action lawsuits seeking potentially multi- millions of dollars in damages because these companies allegedly sent faxes to individuals who had consented to receive them and did not include an "opt-out" notice. *See* FCC Order 14-164 at 13 ("The record in this proceeding demonstrates that a failure to comply with the rule – which has noted above could be the result of confusion or misplaced confidence—could subject parties to potentially substantial damages..."). The basis for those claims is the Telephone Consumer Protection Act ("TCPA").

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order").² Prior to the Fax Order's release, various petitioners had challenged the Commission's authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax

² *See Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014).

advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply to the identified petitioners, and the Commission made clear that other, similarly-situated entities, like Diagnostic, may also seek such waivers.

Specifically, there is no public interest in strict enforcement of the Regulation against businesses who were confused by the Regulation and therefore did not include appropriate opt-out notices to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast, the public interest would be harmed by possibly subjecting businesses like Diagnostic to possible claims in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission’s regulations.³ A waiver is thus appropriate here.

II. BACKGROUND.

A. The Current Statutory and Regulatory Framework.

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),⁴ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁵ An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services

³ Nowhere in the Fax Order does the Commission require petitioners to demonstrate that they would face financial ruin in order to receive the retroactive waiver established in the Fax Order. To the contrary, there is no financial condition that must be met for a petitioner to receive the waiver. Moreover, public policy clearly militates in favor of granting the waiver where there is a possibility of such exposure. As Commissioner Ajit Pai noted in his partial concurrence, “to the extent that [the Commission’s rules] purport to expose businesses to billions of dollars in liability for failing to provide detailed opt-out notices on message that their customers have specifically asked to receive, they depart of common sense...” (Fax Order, p. 18). “If anything, good policy counsels against applying a detailed opt-out notice and private right of action to solicited faxes... Subjecting small businesses to crippling suits at the behest of predatory trial lawyers only serves the interests of those self-same lawyers, not the American public.” (Fax Order, p. 21).

⁴ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

⁵ 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

which is transmitted to any person without that person's prior express invitation or permission."⁶

As relevant to this Petition, the Regulation states a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."⁷ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁸ As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice to Solicited Faxes.⁹ The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission "confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders."¹⁰ Due to the aforementioned confusion,¹¹ however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Diagnostic, who have sent fax ads with the

⁶ *Id.* § 227(a)(5).

⁷ See 47 C.F.R. § 64.1200(a)(4)(iv); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at 3812, para. 48 (2006) (the "Junk Fax Order").

⁸ See generally Junk Fax Order.

⁹ See Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

¹⁰ See Fax Order, para. 1.

¹¹ The Commission detailed the reasons for such uncertainty in the Fax Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that 'the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." See Fax Order, para. 24-25 (internal footnotes omitted).

recipient's prior express permission and may reasonably have been uncertain about opt-out notice requirements for such fax ads. As explained by the Commission:

[W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

* * *

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

The Commission stated that other affected parties similarly situated as the petitioners, like Diagnostic, have six months from the release of the Fax Order (until April 30, 2015) to seek a waiver.¹² Diagnostic's Petition is thus timely.

III. DISCUSSION.

A. **The Commission Should Grant a Limited Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by Diagnostic or on its Behalf.**

Diagnostic respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Faxes sent by Diagnostic (or on its behalf) after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.¹³ Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.¹⁴

¹² See Fax Order, para. 30.

¹³ 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3)(i)-(ii).

¹⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

Further, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.¹⁵ As shown, both rationales apply.

B. Waiver Would Not Undermine the TCPA's Policy Objective.

Granting waiver to Diagnostic would not undermine the policy objective of the TCPA, which is “to allow consumers to stop unwanted faxes.”¹⁶

This policy is not undermined where, as here, the faxes were *wanted*. The fax recipients at issue here have given Diagnostic express permission to send fax advertisements. Notably, the fax recipients were in repeated communication with its certain account executives over several years, yet, to Diagnostic's knowledge, the fax recipient never asked Diagnostic to refrain from sending it faxes. In addition, as noted above, Diagnostic has recently begun re-confirming express consent in connection with all referrals. To date, none of the fax recipients have objected to that re-confirmation.

More broadly, unlike indiscriminate “fax blasters” to the general consumer public, Diagnostic does not send faxes to consumers but rather only to a limited select group of recipients: referring physicians. Without question, Diagnostic has every incentive not to send unwanted faxes to its referring physician network, lest it offend its referral sources. Accordingly, in Diagnostic situation, where its fax recipients *wanted* faxes, a waiver manifestly would not undermine a policy objective to stop *unwanted* faxes.

C. Special Circumstances Suggest Deviation is Appropriate.

As the Commission has explained, special circumstances counsel in favor of deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, there was

¹⁵ See *Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

¹⁶ Junk Fax Order, para. 48.

industry-wide confusion as to whether Solicited Faxes must include an opt-out notice based, in part, on the special circumstance of a confusing footnote in the Junk Fax Order.¹⁷ Diagnostic, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Moreover, while Diagnostic is not a party to any class action lawsuits, waiver strongly is in the public interest because denial of waiver could subject Diagnostic to a potential lawsuit. Surely, Congress did not intend to devastate productive commercial enterprises by transferring the fruits of productivity to plaintiffs' lawyers. Indeed, the Commission made clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently (and allegedly) acted outside of it, like Diagnostic, to potentially ruinous damages:

The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages . . . This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.¹⁸

In sum, Diagnostic sent faxes to its referring physicians with prior express permission and/or consent and was reasonably uncertain about whether opt-out notices were required on such fax ads. Therefore, Diagnostic is similarly situated vis-à-vis the petitioners identified in the Fax Order and equally entitled to a limited retroactive waiver. Such waiver would not undermine the TCPA policy objective to prevent unwanted faxes because the faxes sent by

¹⁷ Diagnostic had, like others, confusion or misplaced confidence regarding their ability to send faxes without the opt-out notice due to the inconsistent footnote.

¹⁸ Fax Order, para. 27.

Diagnostic were wanted by the recipients. Finally, Diagnostic submits that the public interest would be better served by the FCC's granting waiver rather than exposing Diagnostic to potential catastrophic money damages that would serve mainly to enrich plaintiffs' lawyers.

IV. CONCLUSION.

For the reasons stated above, Diagnostic respectfully requests that the Commission grant Diagnostic a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Diagnostic (or on its behalf) after the effective date of the Regulation.

Dated: April 29, 2015

Respectfully submitted,

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